



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 405 OF 2014

[Consolidated with Mombasa E&LRC Cause Numbers 406,407,408,409,410,411,480,481,482,483,484,485,486, 487,488, and 489 all of 2014]

BETWEEN

- 1. MUMBUA KISILU**
- 2. SADAM SHABA ALI**
- 3. ALAFAYAT NYAMARI OBURE**
- 4. KEVIN MWANGI WANJIKU**
- 5. FREDRICK KHALAYI CHESSA**
- 6. RONALD KATONI KASIMU**
- 7. NICHOLAS CHONDO**
- 8. LINTON MMBWANGA AKIMENA**
- 9. WALTER VWUTSU MIHESO**
- 10. KYALO MUTUA**
- 11. BENJAMIN NDETO MALUU**
- 12. DANIEL MUNGA**
- 13. SIMIYU MAURICE KANDAWALA**
- 14. PETER MOMBO MALALA**
- 15. JOHN ANDREW AWAMBO**
- 16. ALI SULEIMAN KOMBO**
- 17. KENNETH NGUGI WAMBUI.....CLAIMANTS**

VERSUS

- 1. ALLIED WHARFAGE LIMITED**
- 2. SKATE SHIP CONTRACTOTS LIMITED.....RESPONDENTS**

***IRB Mbuya & Company Advocates for the Claimants Daly & Inamdar, Advocates for the 1st Respondent Angelo Owino & Company
Advocates for the 2nd Respondent***

JUDGMENT

1. 17 Claimants filed separate Claims against the Respondents, on separate dates in the year 2014, asking the Court to find that they were employed by the Respondents, and that their contracts were unfairly terminated. They seek compensation for unfair termination equivalent of their respective 12 months' wages, together with terminal benefits, costs, interest and any other suitable remedies.

2. Both Respondents do not admit the Claims. The 1st Respondent replies that it did not employ the Claimants. In 2009, the 1st Respondent decided to outsource Casual Workers from a Contractor. It initially contracted ITA Marine Services Limited who provided the 1st Respondent with Casual Workers to work in its warehouses. The outsourcing agreement terminated and the 1st Respondent entered into a fresh outsourcing agreement with the 2nd Respondent herein, Skate Ship Contractors Limited on 1st October 2011. The 2nd Respondent took responsibility over Casual Workers who included the Claimants. The 1st Respondent denies any responsibility over the Claimants.

3. The 2nd Respondent through its Proprietor Alex Waweru Nthigia, denies responsibility, shifting responsibility entirely to the 1st Respondent. It is the position of the 2nd Respondent that it was normally contracted by the 1st Respondent to supply labour. In one of the sites called Kasarani Yard, the 1st Respondent had been contracted to do some work for United Nations. UN does not alternate Workers in short spells, and the Casual Workers engaged there, needed to work in continuity. The 2nd Respondent advised the 1st Respondent to engage the Workers on contract. The 2nd Respondent similarly advised the 1st Respondent to adjust the Workers' wages in line with the increment announced by the Government at 13.1%. The 1st Respondent ignored this advice. The 2nd Respondent states therefore, that the 1st Respondent is solely liable for the Claims filed by the Claimants.

4. The Claims were consolidated and proceeded under Cause Number 405 of 2014. Claimant Number 7, Nicholas Chondo and Claimant Number 16, Ali Suleiman Kombo, gave evidence for the Claimants on 1st March 2017, closing Claimants' case. General Manager Operations Ahmed Haji Abdilatif, gave evidence for the 1st Respondent on 12th June 2019. Alex Waweru Nthigia gave evidence for the 2nd Respondent on 9th July 2019. The matters were last mentioned in Court on 12th March 2020, when the Claimants and the 1st Respondent confirmed the filing of their Closing Submissions. Counsel for the 1st Respondent made some brief oral highlighting of 1st Respondent's Submissions, while the Claimants adopted their written version entirely. Nothing by way of Submissions is indicated to have been received from the 2nd Respondent.

5. Chondo was employed as a Clerk in 2011. He received and inspected goods at the Port of Mombasa. He worked with the other Claimants, at 1st Respondent's premises. The Claimants' contracts were terminated without reason. They did UN work, receiving and processing UN goods at the Port of Mombasa. There were 4 to 5 departments. The Claimants worked in the various departments.

6. A man named Peter Ouma, an Employee of the 1st Respondent, engaged most Workers. They worked in continuity. They were paid Kshs. 500 daily. They did not know the 2nd Respondent. Ouma signed some documents but did not know they were from the 2nd Respondent. He never met anyone from the 2nd Respondent. He did not know about ITA Marine Services Limited. Termination took place on 22nd August 2014. The Claimants were locked out. The Guards at the gate told them there were new contracts they were required to sign, to be allowed in and to continue working. Those who signed were let in, while those who declined, had their contracts terminated. They never went on annual leave. They worked 5 days a week.

7. Cross-examined by Counsel for the 1st Respondent, in the absence of the 2nd Respondent and its Counsel, Chondo told the Court he did not have documents showing he worked for the 1st Respondent. He worked for UN through the 1st Respondent. His work involved loading, unloading and arranging UN cargo. If UN was not involved, it would compel the Claimants to leave. They were employed at different times, but paid the same rate at Kshs. 500 per day. Chondo did not have anything to show that Ouma worked for the 1st Respondent. He signed pay roll on receipt of his pay. The roll was in the name of the 2nd Respondent. He did not however, know who the 2nd Respondent was. He did not know about outsourcing agreements. The Claimants were told those who signed the new contracts would continue working. Ali Suleiman had signed the new contract. It was terminated after it was discovered he was among the Claimants in Court. The Claimants seek severance pay. No reason was given to justify termination.

8. Ali Suleiman told the Court he worked as a Warehouse Assistant, receiving and verifying goods. He was employed in 2011, and his contract terminated on 30th June 2014. He did not have a written contract. The 1st Respondent had business with the UN. There were no permanent Workers. Peter Ouma was the Supervisor. Casual Workers were the backbone of the 1st Respondent. They were never issued contracts by the 1st Respondent. They earned Kshs. 500 daily. They were stopped by the Guards at the gate and told they could not work, because they did not have contracts. The 2nd Respondent was issuing contracts. Suleiman used to sign payroll on receiving his pay. He did not read details on the payroll. He did not know the 2nd Respondent.

9. Cross-examined by Counsel for the 1st Respondent, Suleiman told the Court that he was not issued a contract by the 1st Respondent. They did not work for UN exclusively. Peter Ouma gave the Claimants 2nd Respondent's documents to sign. They were locked out on 30th June 2014. Others left before. He came to know about the 2nd Respondent later. If he had signed the new contract, he would have gone on working.

10. Ahmed Haji Abdilatif adopted in his oral evidence, the contents of his Witness Statement, which replicates 1st Respondent's Statement of Reply, summarized at the outset of this Judgment. Cross-examined, he told the Court, he was employed in 2008. He oversaw operations. He was not aware that the Claimants worked from 2012. The Respondents had discussed the outsourcing agreement. It was proposed the team at Kasarani Yard, is issued contracts. The Casual Workers were engaged by the 2nd Respondent. They were paid by the 2nd Respondent. Abdilatif stated on redirection that the Claimants were paid their daily wages by the 2nd Respondent. They were supplied to the 1st Respondent by the 2nd Respondent. The outsourcing agreement was from 2011 and renewed thereafter. The 2nd Respondent was entirely responsible for the Claimants.

11. Alex Waweru Nthigia for the 2nd Respondent told the Court it is true his company supplied the 1st Respondent with Casual Workers. The 2nd Respondent paid the Workers. They were stationed at Kasarani Yard. They were in casual employment. They did not work for 30 days in continuity. Nthigia asked the 1st Respondent to improve the Claimants' terms. The 1st Respondent did not comply, saying the Claimants were 'regular casuals.' The 2nd Respondent advised the 1st Respondent it could walk out of the outsourcing agreement. The Claimants were paid Kshs. 500 daily.

12. Cross-examined by Counsel for the Claimants, Nthigia told the Court, the Claimants all worked in excess of 1 year. They were paid daily. They were not subscribed to N.S.S.F and N.H.I.F. UN did not advise that their terms are regularized. In response to questions from Counsel for the 1st Respondent, Nthigia told the Court that: *the 2nd Respondent was contracted by the 1st Respondent to supply casual labour; the 2nd Respondent was to pay wages directly; the 2nd Respondent was to have insurance to cover work injury for the workers; the 2nd Respondent was responsible in event of worker injury or death; and labour disputes involving the workers, was indicated to be entirely the responsibility of the 2nd Respondent.* Nthigia conceded this constituted the entire outsourcing agreement. It does not contradict 2nd Respondent's position that the Claimants were employed by the 1st Respondent. The 2nd Respondent continued to supply labour, even after advising the 1st Respondent to adjust the terms and conditions of employment for the Claimants, without the 1st Respondent acting on this advice. The 2nd Respondent gave notice to rescind the outsourcing agreement. The Respondents met and resolved to issue the Claimants contracts. Nthigia did not exhibit the contracts.

13. The issues are-

§ Who employed the Claimants?

§ Was termination of Claimants' contracts fair?

§ Who bears legal responsibility, if any, for the Claimants?

§ What remedies are available?

The Court Finds:-

14. There is little doubt that the Claimants worked at the 1st Respondent's business, between 2011 and 2014. They worked in different departments, performing such tasks as loading, offloading, and processing cargo for 1st Respondent's Client, the United Nations. For security purposes, the Court was told, UN did not encourage engagement of casual labour on daily basis. The Claimants therefore worked for above one year, in continuity.

15. As to who was the Employer, the answer is to be found mainly in the outsourcing agreements and the evidence of Alex Waweru Nthigia.

16. The agreements, signed between the Respondents from 2011, stipulate that the 2nd Respondent would supply the 1st Respondent with Casual /Piece- rate Workers. The agreements, standardly state that, the supplied Workers are employed by the 2nd Respondent. The 2nd Respondent would directly pay the Workers. The 2nd Respondent obligated itself, to comply with all laws, rules and regulations pertaining to labour and employment. The 2nd Respondent would maintain work injury insurance cover for the Workers at all times. It was agreed between the Respondents that the 2nd Respondent would be responsible for any labour disputes involving the Workers, and shoulder liability for any decisions made pursuant to such disputes.

17. The 2nd Respondent assumed 100% liability for the Workers recruited to work for the 1st Respondent. The Claimants were by virtue of successive outsourcing agreements, employed by the 2nd Respondent. In his evidence, Nthigia did not dispute the presence or the contents of the outsourcing agreements. He spent a large portion of his pleadings and evidence, describing the lengths he went into, to persuade the 1st Respondent, to bring the Claimants into formal employment. The outsourcing agreements however, placed him at the full control of the Claimants. The 1st Respondent has no responsibility at all in this Claim, and the ***Court finds the Claims against the 1st Respondent must be rejected in their totality.***

18. Was termination fair? The Respondents sat and discussed the need to place the Claimants under contract, given that they were essentially serving in a business associated with the UN, whose policy leans against casualization. They were offered written contracts. They declined to

sign. They did not tell the Court why they declined, but confirmed, that Workers who signed the contracts, continued working.

19. The Court does not see why a Casual Worker, who is offered a written contract, should decline to sign the written contract, then when barred from the workplace, complain about unfair termination. The Claimants concede in their evidence that if they had signed the contracts issued by the 2nd Respondent, they would have gone on working.

20. It is not reasonable to call upon the Employer in the circumstances, to show reason or reasons for termination. The Employer was ready to continue employing the Claimants, by engaging them on contract in accordance with the law and the workplace policy. The Claimants declined the offer, and there was no way they could continue working as Casual Workers.

21. Termination was not unfair. The Claimants are not entitled to notice pay and compensation for unfair termination.

22. They were paid Kshs. 500 daily. Daily rates include the housing element. There is no merit in the prayer for house allowance in arrears.

23. The 2nd Respondent did not show that it subscribed the Claimants under the N.S.S.F or any other Social Security Plan. It did not let the Claimants utilize their annual leave, or pay them annual leave pay. Nthigia also conceded in his advice to the 1st Respondent that, the Claimants were paid below the minimum wage. He advised the 1st Respondent that the Claimants were entitled to pay adjustment as declared by the Government. The 2nd Respondent does not dispute the rate of increment pleaded by the Claimants.

24. The Court shall allow the prayers for **annual leave, service pay, and underpayment of wages** as particularized in each of the Statement of Claim filed by the Claimants.

25. No order on the costs.

26. Lastly the Court must record that it has been compelled to release this Judgment from the confines of the Trial Judge's home at Chaka, Nyeri County, owing the covid-19 pandemic. Rule 28 of the E&LRC Procedure Rules, which requires delivery of the Court's decisions in Open Court, is not capable of enforcement under present circumstances, without risking the lives of the participants in these proceedings. Other modes of delivery such as online platforms are neither failsafe, nor safe. The Court must retain control of the proceedings under Rule 38. Parties shall access copy of the Judgment from the Registry and as soon as practicable, from the Kenya Law Reports web portal.

IN SUM, IT IS ORDERED:-

a. It is declared that the 2nd Respondent was the sole Employer of the Claimants.

b. The Claims against the 1st Respondent are rejected.

c. The 2nd Respondent shall pay each Claimant annual leave pay, service pay and underpayment of wages as particularized in each of the Statement of Claim filed by the Claimants.

d. No order on the costs and interest.

e. The 2nd Respondent is granted an order of stay of execution for 45 days.

f. A copy of the Judgment shall be placed in all the 17 files.

Dated, signed and released at Chaka, Nyeri County for dispersal to the Parties, this 29th day of May 2020.

James Rika

Judge